

# Shainis & Peltzman, Chartered

Counselors at Law

Suite 290  
1901 L Street, N.W.  
Washington, D.C. 20036

(202) 293-0011  
Fax (202) 293-0810

Aaron P. Shainis  
Lee J. Peltzman

Of Counsel  
William H. BuRoss, III  
Ruth S. Baker-Battist  
Robert J. Keller

May 25, 1999

Ms. Magalie Salas  
Secretary  
Federal Communications Commission  
Portals II - 12<sup>th</sup> Street Lobby  
Filing Counter - TW-A325  
445 - 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

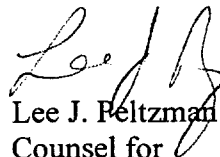
RECEIVED  
MAY 25 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: MM Docket No. 97-234  
GC Docket No. 92-52  
GEN Docket No. 90-264

Dear Ms. Salas:

Transmitted herewith, on behalf of Orion Communications Limited, is an original and fourteen (14) copies of its Reply to Wilsyr Communications Limited Partnership's Opposition to Orion's Motion for Stay Pendente Lite and to Wilsyr Communications Limited Partnership's Motion to Recuse FCC Commissioners in the above-referenced rule making proceeding. Please contact the undersigned in the event the Commission has any questions with respect to this Reply.

Sincerely,



Lee J. Peltzman  
Counsel for  
ORION COMMUNICATIONS LIMITED

Enclosure

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

MAY 25 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket 97-234
of the Communications Act-	)	
Competitive Bidding for Commercial	)	
Broadcast Instructional Television	)	
Fixed Services	)	
	)	
Reexamination of the Policy	)	GC Docket 92-52
Statement on Comparative Broadcast	)	
Hearings	)	
	)	
	)	
Proposals to Reform the	)	GEN Docket 90-264
Commission's Comparative Hearing	)	
Process to Expedite The Resolution	)	
Of Cases	)	
	)	

To: The Commission

ORION COMMUNICATIONS, LTD.'S REPLY TO WILSYR COMMUNICATIONS  
LIMITED PARTNERSHIP'S OPPOSITION TO ORION'S MOTION FOR STAY  
PENDENTE LITE AND TO WILSYR COMMUNICATIONS LIMITED  
PARTNERSHIP'S MOTION TO RECUSE FCC COMMISSIONERS

Orion Communications Limited ("Orion"), by counsel,  
replies to Wilsyr Communications, L.P.'s ("Wilsyr")  
Opposition to Orion's Motion for Stay and to Wilsyr's  
Motion to Recuse.

1. Standing.

Wilsyr first claims Orion lacks standing to seek a stay at the Commission and also cannot proffer the declaration of its expert economist, Dr. Sayers.<sup>1</sup> These claims miss the mark.

We turn first to Orion's request for a stay. Wilsyr submits Orion lacks standing to prosecute such a motion since Orion has an appeal pending before the U.S. Court of Appeals for the D.C. Circuit. Wilsyr cites no case for its contention. Perhaps Wilsyr is unaware of D.C. Circuit Rule 18, which requires Orion to present its stay application before the Commission in the first instance.

Moving on, Wilsyr states Orion cannot ask the Commission to consider the facts and authorities set forth in Dr. Sayers Declaration because Orion did not raise them incident to a request for reconsideration and allegedly violated 47 U.S.C. § 405.<sup>2</sup> Wilsyr, of course, overlooks the fact that some of Dr. Sayers' analysis evaluates the instant case in light of the recent Fresno Mobile Radio decision.<sup>3</sup> Fresno issued on February 5, 1999, long after

---

<sup>1</sup> Wilsyr Mot. at 3.

<sup>2</sup> Wilsyr Mot. at 3-4.

<sup>3</sup> Fresno Mobile Radio v. FCC, 165 F.3d 965, 969 (D.C.Cir. 1999) (granting petition for review) (flawed order).

the period for filing petitions for reconsideration of the underlying First Report and Order.<sup>4</sup>

What's more, Wilsyr overlooks something else: Section 405 of the Communications Act is satisfied where the Commission has had a fair opportunity to consider an issue below.<sup>5</sup> Orion has presented Dr. Sayers' expert opinion to assist the Commission in assessing the instant motion.

If Wilsyr has anything constructive to add on the merits of what Dr. Sayers stated, it is free to do so. Its Section 405 argument, however, is misplaced.

## **2. Irreparable Injury**

Wilsyr's sole substantive opposition to Orion's motion is to argue Orion cannot demonstrate the requisite irreparable injury for a stay. Nowhere does Wilsyr analyze the case under the traditional test of Virginia Petroleum Jobber's Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958) and its progeny<sup>6</sup> or the modified standard of Washington Metropolitan Area Transit System v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

---

<sup>4</sup> First Report and Order, 13 FCC Rcd 15920 (1998).

<sup>5</sup> Cf., Busse Broadcasting Corp. v. FCC, 87 F.3d 1456, 1460-61 (D.C.Cir. 1996) (recognizing principle but finding petitioner had abandoned argument).

<sup>6</sup> Wisc. Gas Co. v. F.E.R.C., 758 F.2d 669, 673-74 (D.C.Cir. 1985); Found'n on Economic Trends v. Heckler, 756 F.2d 143, 151 (D.C. Cir. 1985).

Wilsyr's claim is basically this: if the auction mechanism is upheld on appeal Orion would suffer no harm. Orion could only be irreparably injured if it participates in an auction, loses, and is told to get off the air prior to the completion of judicial review.<sup>7</sup>

Wilsyr's argument ignores practical exigencies and historical facts:

1. Wilsyr, as part of the now-defunct Biltmore Forest Consortium, convinced the Commission to shove Orion off the air in June, 1997, before judicial review was completed in the United States Court of Appeals of the Commission's orders awarding interim operations to the consortium. It took seven more months before judicial review was effectively completed and the Court's mandate enforced.<sup>8</sup> That time off the air cost Orion incalculable lost revenues and listening audience.<sup>9</sup>
2. Wilsyr's contention also blinks at reality. In all likelihood, judicial review of the pending Order will not be completed before the impending

---

<sup>7</sup> Wilsyr Mot. at 10.

<sup>8</sup> Orion Communications, Ltd. v. FCC, 131 F.3d 176 (D.C.Cir. 1997).

<sup>9</sup> Betty Lee Supp. Dec., ¶ 2 (May 24, 1999).

September 28, 1999 auctions. It currently takes about a year between the time a case begins in the U.S. Court of Appeals for the D.C. Circuit and the case's disposition.<sup>10</sup> Thus, for an entity which cannot realistically afford now to play in the new rich man's auction game, as Orion's prior declarations assert, Orion faces the prospect of imminent economic destruction long before judicial review is complete. By anyone's standard that constitutes irreparable injury.

3. What's more, the Commission has used some unknown formula to set a minimum bid of \$130,000. In effect the FCC now demands Orion commit that astronomical sum just to bid. Meanwhile Orion is supposed to ignore half a million dollars worth of legal fees and expenses and thirteen years investment into the case, which cannot be recovered.<sup>11</sup>

---

<sup>10</sup> Administrative Office of the United States Courts, Annual Report of the Director at Table B-4 (1999) (median of all civil cases was 10.9 months for twelve months ending Sept. 30, 1997).

<sup>11</sup> FCC Public Notice, DA 99-940 at 12 (May 17, 1999). Orion has tendered a FOIA request to ascertain this formula's underpinnings.

### 3. The Merits.

It is not insignificant that Wilsyr says not a word about the FCC's uneven treatment of Orion's and its sisters' cases versus its treatment of the broadcaster renewal application cases. What's more, Wilsyr is conspicuously, almost painfully, silent about and controlling law cited in Orion's motion, such as Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987) (*en banc*), which governs "secondarily retroactive" administrative rules altering the future consequences of past transactions.

Here, the FCC has created a new rule of first impression which reverses settled practice and curtails Orion's and its colleagues' financial investments. The new rule clearly has secondarily retroactive implications. It dramatically impacts Orion's prior financial investment, which exceeds \$500,000. Finally, no statutory interests are at stake: the FCC has the discretion to adopt reasoned comparative rules for cases such as Orion's; Wilsyr's assertion to the contrary is undercut by its mis-citation.<sup>12</sup>

---

<sup>12</sup> Wilsyr Mot. at 16 (citing Congressional Record, p. S11309 (Oct. 29, 1997)). Reference to that page, attached to Wilsyr's brief, simply does not support Wilsyr's exuberant claim the FCC lacks discretion to hold comparative hearings for Orion's and its colleagues' cases.

#### 4. Character Attack

As has become dismayingly familiar, retreating behind a word-processor has emboldened Wilsyr to launch yet another attack on Orion by arguing Orion should be estopped from participating in the auction. What that has to do with the issue before the Commission is left unstated. Logically, of course, the answer is: nothing.

#### 5. Motion to Recuse

Finally, Wilsyr, supported by its so-called General Partner's affidavit,<sup>13</sup> resurrects its claim of political skullduggery and demands Commissioner Kennard recuse himself and other Commissioners disclose whether they have been in contact with senatorial offices about this matter.

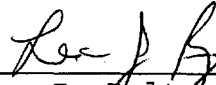
---

<sup>13</sup> Orion Communications, Ltd. v. F.C.C., 131 F.3d at 180 (citing administrative finding that Wilsyr General Partner Harrison was "sham" and "window dressing").

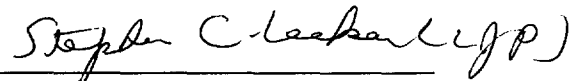


Since the Commission has given Wilsyr what it wants, viz.,  
an auction, one wonders why Wilsyr continues to raise this  
discredited old saw.

Respectfully submitted,  
Orion Communications, Ltd.



\_\_\_\_\_  
Lee J. Peltzman  
Shainis & Peltzman  
Suite 290  
1901 L St., NW  
Washington, D.C.  
202.293.0569



\_\_\_\_\_  
Stephen C. Leckar  
Butera & Andrews  
Suite 500  
1301 Pennsylvania Ave., NW  
Washington, D.C. 20004  
202.347.3785

May 25, 1999

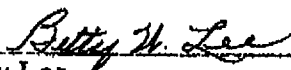
## SUPPLEMENTAL DECLARATION OF BETTY LEE

1. I am a principal of Orion Communications, Ltd.
2. Orion has since 1994 operated the Biltmore Forest, N.C.-FM frequency under interim authority. In June, 1997, we were forced off the air by the FCC, which replaced us with the so-called Biltmore Forest Consortium. We did not regain our temporary operating authority until mid-January, 1998, when the Court struck down the FCC action taking us off the air. We lost incalculable advertising revenues and market share during that period and still have not recovered from it. Moreover, we lost the services of several valued employees, who we have not been able to replace because of the previous shut down by the FCC.

I have read the foregoing and declare under penalty of perjury that it is true to the best of my knowledge.

Executed at Asheville, N.C.

this 24<sup>th</sup> day of May, 1999.

  
Betty Lee

CERTIFICATE OF SERVICE

I, Lisa L. Stone, secretary at the law firm of Shainis & Peltzman, Chartered, do hereby certify that I sent copies of the foregoing this 25th day of May, 1999, via first class U.S. mail, postage prepaid, to the following:

Robert J. Wiggers, Esq.  
Department of Justice,  
Antitrust Div.  
Appellate Section, Rm. 10535  
Patrick Henry Bldg.  
601 D St., NW  
Washington, D.C. 20530

Daniel M. Armstrong, Esq.  
& Gregory Christopher, Esq.  
Office of the General Counsel  
Federal Communications Commission  
445-12<sup>th</sup> St., SW, Room 8-A766  
Washington, D.C. 20554;

Stephen Yelverton, Esq.  
1225 New York Ave., NW  
Washington, D.C. 20005

Timothy Brady, Esq.  
Suite 208  
P.O. Box 986  
Brentwood, TN 37207

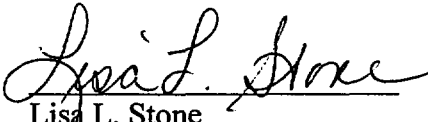
Donald J. Evans, Esq.  
Donelan, Clary, Wood & Maser  
1100 New York Ave., NW, Suite 750-W  
Washington, D.C. 20005-3934

Robert Depont, Esq.  
P.O. Box 386  
Annapolis, MD 21404

Harry Cole, Esq. & Gene Bechtel, Esq.  
Bechtel & Cole, Chtd.  
1901 L St., NW,  
Washington, D.C. 20036

Robert Marmet, Esq.  
2932 Thurston Rd.  
Frederick, MD 21704

Richard Swift, Esq.  
Tierney & Swift  
2173 K Street, NW  
Suite 350  
Washington, D.C. 20037

  
Lisa L. Stone